TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 98.

THE POSTAL TELEGRAPH-CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOROUGH OF TAYLOR.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

FILED JULY 20, 1908.

(13,000)

(18,615.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1903.

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1 *Petition for Allowance of Writ of Error.*

In the Supreme Court of Pennsylvania, Eastern District, January Term, 1901.

BOROUGH OF TAYLOR
against
POSTAL TELEGRAPH CABLE COMPANY, Appellant. } No. 191.

To the Honorable J. Brewster McCollum, chief justice of the supreme court of Pennsylvania:

The petition of the Postal Telegraph Cable Company, respectfully showeth:—

That a suit against it was brought into the supreme court of Pennsylvania, for the eastern district, of January term, No. 191, by writ of certiorari from the judgment of the superior court of Pennsylvania, of January term, No. 24, affirming the judgment of the court of common pleas Lackawanna county, of March term, 1900, No. 447, in which suit in said supreme court and said superior court your petitioner was appellant, and defendant in the said court of common pleas; and The Borough of Taylor was appellee in said supreme court and said superior court, and plaintiff in said court of
2 common pleas. That the said suit in the said court of common pleas was an action of assumpsit, brought to recover what it called licensed fees and charges for the years, beginning January 31st, 1898, and January 31st, 1899, amounting to one dollar ($1.00), per year for each telegraph pole, and two dollars and fifty cents ($2.50) per mile of wire upon said poles of your petitioner, maintained and used by it in the said borough of Taylor.

Your petitioner, in answer to said suit, claimed that it was not liable as charged, because it was a corporation of the State of New York, and had paid all taxes due by it to the Commonwealth of Pennsylvania upon the value of its poles and wires erected and maintained in said borough and elsewhere in said State; that it had accepted the act of Congress, approved July 24th, 1866, and the amendments and supplements thereto; that the poles and wires in question were principally employed and operated in the transmission of messages between the different States, and are therefore instruments of commerce among the several States; that the poles and wires were constructed and have been at all times used for the transmission of telegraphic messages of the United States Government; that the highways upon which said poles and wires are constructed and operated are post roads and post routes; that the said poles and wires are part of the interstate telegraph system of the
3 petitioner, run into and through nearly every State of the United States and connect with submarine cables of Europe and other foreign countries; that your petitioner never has maintained any office in said borough, and the said telegraph line, consisting of said poles and wires, merely runs through it, and no

telegraph business of any kind is done or transacted by it in said borough, except the maintenance of the said line and the transmission of telegraphic messages over the same.

That the said court of common pleas of Lackawanna county rendered judgment against your petitioner, on April 25th, 1900, in the sum of two hundred and twenty dollars and fifty cents ($220.50). That on February 14th, 1901, the superior court of Pennsylvania, sitting at Philadelphia, ordered said judgment to be affirmed, and afterwards, on the fourteenth of February, 1901, the said judgment was duly entered and recorded in the eastern district of Pennsylvania aforesaid. That on May 19th, 1902, the supreme court of Pennsylvania, sitting at Philadelphia, ordered said judgment of the superior court to be affirmed, and afterwards, on the 19th day of May, 1902, said judgment was duly entered and recorded in the eastern district of Pennsylvania aforesaid. That the said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania; that the judgment of the said court is final.

4 That the right, title, privilege and immunity claimed by your petitioner, defendant and appellant aforesaid, was claimed under the Constitution of the United States, article 1, sec. 8, clause 3, providing, amongst other things, that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. Also, under the constitution of the State of Pennsylvania, article 16, sec. 12, providing that corporations organized for the purpose shall have the right to construct lines of telegraph within the State of Pennsylvania, and directing the General Assembly to provide reasonable regulations to give full effect to said section. Also, that pursuant to this mandate the legislature of Pennsylvania, by the act of April 29th, 1874, sec. 33, P. L. 92, provided that telegraph companies should have the right to construct lines of telegraph along and upon any of the public roads, streets, lanes or highways of the State.

That the decision and judgment of the supreme court of Pennsylvania aforesaid was against the right, title, privilege and immunity so claimed as aforesaid. Your petitioner therefore prays for the allowance of a writ of error to the Supreme Court of the United States, in order that the said judgment of the supreme court of Pennsylvania may be re-examined and reversed or affirmed in the United States Supreme Court;

And it will ever pray.

5 POSTAL TELEGRAPH CABLE COMPANY,
By W. H. BAKER, *Vice Pres't.*

STATE OF NEW YORK, }
County of New York, } *ss:*

Wm. H. Baker, being duly sworn according to law, deposes and says that he is the vice-president of The Postal Telegraph Cable Company, the petitioner above named, and on behalf of the said com-

pany says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

W. H. BAKER.

Sworn and subscribed before me this 26th day of May, 1902.
[SEAL.] THEODORE L. CUYLER, JR.,
Notary Public Notary Public, *Kings County.*

Certificate filed in N. Y. Co.

STATE OF NEW YORK, } ss:
County of New York, }

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify, that Theodore L. Cuyler,
6 Jr. has filed in the clerk's office of the county of New York, a certified copy of his appointment and qualification as notary public for the county of Kings with his autograph signature and was at the time of taking the annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 26 day of May, 1902.
[SEAL.] THOS. L. HAMILTON, *Clerk.*

Endorsement: Supreme court of Pennsylvania, eastern district. Borough of Taylor *v.* Postal Tel. Cable Co. Appeal of the Postal Telegraph Cable Company from the judgment and decree entered in the case in which The Borough of Taylor was pl'ff and the above named appellant, defendant.

And now, to wit, June 6th 1902, citation awarded and writ of error allowed by me.

J. BREWSTER McCOLLUM,
Chief Justice of Penna.

7 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the honorable the supreme court of the State of Pennsylvania for the eastern district, Greeting:

Because, in the records and proceedings as also in the rendition of the judgment of a plea, which is in the said supreme court of Pennsylvania, for the eastern district, before you, or some of you, being the highest court of law and equity of the said State in which a decision could be had, which plea was the appeal of the Postal Telegraph Cable Company, of January term, 1901, No. 191, to the Supreme

Court, by writ of certiorari, from the judgment of the superior court of Pennsylvania, of January term, 1901, No. 24, affirming the judgment of the court of common pleas of Lackawanna county, of March term, 1900, No. 447, in a certain suit between The Borough of Taylor, plaintiff, against The Postal Telegraph-Cable Company, defendant, wherein was drawn in question the validity of the Constitution and statute law of the United States, and a defense claimed and exercised thereunder, and the decision was against their validity, a manifest error hath happened, to the great damage of the said Postal Telegraph-Cable Company, as by their complaint appears.

8 & 9 We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of June, in the year of our Lord one thousand nine hundred and two, and the one hundred and twenty-sixth year of the Independence of the United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

GEORGE BRODBECK, JR.,
Pro Clerk United States Circuit Court,
Eastern District of Penna.

10 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1901.

BOROUGH OF TAYLOR
against
POSTAL TELEGRAPH-CABLE COMPANY, Appellant. } No 191.

Citation.

The United States of America to the Borough of Taylor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, next, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the eastern district, wherein The Postal Telegraph-Cable Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said

plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

11 Witness the Honorable J. Brewster McCollum, chief justice of the supreme court of Pennsylvania, this 6th day of June, in the year of our Lord one thousand nine hundred and two (1902).

J. BREWSTER McCOLLUM,
Chief Justice of Penna.

Now July 5, 1902, service of the within citation is hereby accepted, and copy waived.

THE BOROUGH OF TAYLOR,
By JOHN M. HARRIS, *Solicitor.*

12 [Endorsed:] 191 Jan'y term 1901 Supreme court of Penna. eastern district Borough of Taylor *v.* Postal Telegraph-Cable Company, appellant Citation Frank R. Shattuck, attorney at law, Betz building, Philadelphia.

13 *Bond Sur Writ of Error to the Supreme Court of the United States.*

Know all men by these presents: That we, the Postal Telegraph-Cable Company, as principal, and the Union Surety & Guaranty Co. as surety, are held and firmly bound unto the Borough of Taylor in the full and just sum of six hundred dollars, to be paid to the said Borough of Taylor, its certain attorney, successors or assigns, to which payment well and truly to be made we do bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Seal- with our seals, and dated the 27th day of May, in the year of our Lord one thousand nine hundred and two (1902).

Whereas lately at a court of common pleas of Lackawanna county, a judgment was entered against the Postal Telegraph-Cable Company, at the suit of the Borough of Taylor, of March term, 1900, No. 447, which judgment was afterwards affirmed by the supreme court of the State of Pennsylvania in a certain plea and suit in said court, of January term, 1901, No. 191, and the said Postal Telegraph-Cable Company having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment rendered in the last above entitled action, and having filed a copy thereof in the office of the prothonotary of said court, and a citation directed to the said Borough of Taylor, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Wash-

14 ington the second Monday of October, next.

Now the condition of the above obligation is such, that if the said Postal Telegraph-Cable Company shall prosecute its said writ of error to effect and answer all damages and costs, if they shall

fail to make their plea good, then the above obligation to be void, else to be and remain in full force and virtue.

THE POSTAL TELEGRAPH-CABLE CO.,
By W. H. BAKER, *Vice-President.*

Attest:
[SEAL.] CHAS. P. BRUCH, *Ass't Secretary.*

THE UNION SURETY & GUARANTY CO.
HERMAN SCHUYLER,
Acting Vice-President.

Attest:
[SEAL.] JOHN H. MYERS, *Secretary.*

Approved by
J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

Endorsement: Supreme court of Penna. eastern district. Borough of Taylor *v.* Postal Tel.-Cable Co., appellant. Bond sur writ of error to the Supreme Court of the United States.

15 Supreme Court of Pennsylvania, Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania, in and for the eastern district, *inter alia*, the following is thus contained:

APPEARANCE DOCKET.

Docket Entries.

January Term, 1901. No. 191.

BOROUGH OF TAYLOR, Plaintiff,
v.
POSTAL TELEGRAPH CABLE COMPANY, Defendant. } 191.

Frank R. Shattuck.
Appeal of defendant C. P. 447 March term 1900 superior court 24 January term 1901 from the judgment.

Appeal from the *superior court* filed May 20, 1901.
Eo die.—Certiorari exit and directed to the court of *common pleas* of the county of *Lackawanna*, ret'ble forthwith.
16 April 22, 1901.—Petition for an allowance of an appeal from the superior court to the supreme court filed.
May 1, 1901.—Appeal allowed. *Per curiam.*
February 24, 1902.—Record returned and filed.
Eo die.—Assignments of error filed.
February 24, 1902.—Argued.

May 19, 1902.—Judgment affirmed. *Per curiam.*

June 6, 1902.—Petition for writ of error from the Supreme Court of the United States brought into office.

"And now June 6, 1902 citation awarded and writ of error allowed by me

J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

June 6, 1902.—Bond in sum of six hundred dollars brought into office and filed.

June 28, 1902.—Writ of error from the Supreme Court of the United States brought into office.

July 7, 1902.—Citation with acceptance of service brought into office.

Eo die.—Assignments of error *in re* writ of error brought into office.

17 *Appeal and Affidavit.*

In the Supreme Court of Pennsylvania for the Eastern District.

BOROUGH OF TAYLOR, Plaintiff, *v.* POSTAL TELEGRAPH CABLE COMPANY, Defendant. } No. 24. Superior Court of Pennsylvania, January Term, 1901.

Enter appeal on behalf of Postal Telegraph Cable Co. from the judgment of the superior court of Pennsylvania.

F. R. SHATTUCK,
Att'y for Appellant.

To Charles S. Greene, prothonotary supreme court, eastern district.

STATE OF NEW YORK, *County of New York,* } *ss:*

William H. Baker, vice president of the Postal Telegraph Cable Company being duly sworn saith that said appeal is not taken for the purpose of delay, but because appellant believes it has
18 suffered injustice by the judgment from which it appeals.

WILLIAM H. BAKER.

Sworn to and subscribed, this 14th day of May, A. D. 1901.

[SEAL.] THEODORE L. CUYLER, JR.,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

Endorsement: No. 191 January term, 1901. Supreme court of Pennsylvania, eastern district. Borough of Taylor *v.* Postal Telegraph Cable Company. Appeal and affidavit. Filed May 20, 1901. In supreme court. Frank R. Shattuck, attorney for appellant.

Præcipe for Certiorari.

In the Supreme Court of Pennsylvania for the Eastern District.

POSTAL TELEGRAPH CABLE COMPANY, Appellant. No. 447, March Term, 1900.

Certiorari to the court of common pleas of the county of Lackawanna.

Issue certiorari to the court of common pleas of the
19 county of Lackawanna to bring up record and proceedings in a certain action in said court, No. 447 March term 1900 and in the superior court of Penna. No. 24 January term 1901 wherein Borough of Taylor was plaintiff and the said appellant was defendant. Returnable to next term, *sec. reg.*

——— ———,
Attorney for Appellant.

To Charles S. Greene, prothonotary supreme court—eastern district.

Endorsement: No. 191 January term 1901. Supreme court of Pennsylvania, eastern district. Borough of Taylor *v.* Postal Telegraph Cable Company. Præcipe for certiorari. Filed May 20, 1901. In supreme court. Frank R. Shattuck, attorney for appellant.

Petition for Allowance of an Appeal from Superior Court to Supreme Court.

Supreme Court of Pennsylvania.

BOROUGH OF TAYLOR, Appellee,
v.
POSTAL TELEGRAPH CABLE CO., Appellant.

20 To the honorable the judges of said court:

The petition of the Postal Telegraph Cable Company respectfully represents.

That it is the defendant and appellant in a certain action now pending in the superior court of Pennsylvania, for the eastern district thereof, of January term 1901 No. 24, wherein The Borough of Taylor is the plaintiff. Said action was originally commenced by the said Borough of Taylor in and for the county of Lackawanna, in the State of Pennsylvania: The rule for judgment for want of a sufficient affidavit of defense was entered by the plaintiff and the said rule made absolute. An appeal was taken to the superior court of Pennsylvania, for the eastern district thereof, which said court, by an

opinion filed therein upon the fourteenth day of February, 1901, duly affirmed the said judgment.

The claim of the plaintiff, the said Borough of Taylor, against the defendant, is to recover license fees for two years, beginning January 31, 1898 and ending January 31, 1900, sought to be imposed upon the defendant by a certain ordinance of the borough of Taylor, approved January 10, 1894, by the terms of which every telephone, telegraph, electric and electric railway company, erecting or maintaining poles or wires within the borough limits, is required to pay an annual license fee of one dollar for each pole and
21 two dollars and a half for each mile of wire so erected or maintained.

The poles and wires situate in the borough of Taylor are a part of the interstate telegraph system of the defendant running into and through nearly every State of the United States, and connecting with submarine cables from the United States to Europe and other foreign countries, and the messages transmitted over such telegraph lines maintained by the said poles and wires are in part telegraphic messages between different States of the United States and between the United States and foreign countries, and said messages are one species of interstate and international commerce.

The defendant has never maintained any office whatsoever in the borough of Taylor, and its said telegraph line merely runs through it, and no telegraph business of any kind whatsoever is done or transacted therein, except the maintenance of said line and the transmission of telegraphic messages over the same. There was no cost, expense, damage or liability imposed upon the said borough, as it was positively set forth in the affidavit of defense, nor was there any supervision or regulation whatsoever by the said borough of said poles and wires. Under the facts as set forth in the affidavit of defense, the defendant contended that there was no power in the borough of Taylor to levy such a license fee or tax by ordinance or otherwise, or any authority for so doing, because the defend-
22 ant in the transaction of business carried on by means of said poles and wires, was engaged in the transaction of commerce among the several States and with foreign nations, and that the attempted imposition of license fees in question was in fact denying the defendant the equal protection of the laws and was a tax levied on the franchise granted by the United States of America and upon one of the instrumentalities employed by the Government thereon in the carrying on of the said Government, and was in fact the imposition of a tax upon interstate business and illegal and void as an unlawful interference with commerce among the several States. It was also set forth in said affidavit of defense that defendant was a corporation of the State of New York, and that it had accepted the act of Congress approved July 24, 1866, and the amendments and supplements thereto. It was also set forth in said affidavit of defense that the said poles and wires were constructed and have been at all times and are now used for the transmission of telegraphic messages of the United States Government and the various departments

thereof, at prices fixed from time to time by the Postmaster General of the United States, in accordance with the terms of the said act of Congress, approved July 24, 1866, and that the highways upon which the said poles and wires are constructed and operated are post roads and post routes within the meaning of said act of Congress and the amendments and supplements thereto, and the acts of
23 Congress defining post roads and post routes.

Upon the argument in the superior court, the point involved was the power of the borough of Taylor to impose said license fees, because the said ordinance was a regulation of commerce between the States, and amounted to taxation upon interstate commerce, and therefore void; and it is also not within the power of the borough of Taylor to impose these license fees by reason of the provisions of clause 3, section 8 of article 1 of the Constitution of the United States.

Your petitioner further avers that it denies in this case the right of the borough of Taylor to impose any license fees whatsoever upon its poles and wires, because the same are in fact a regulation of commerce between the States, and their imposition is not justified by any police power existing, or claimed to exist, in the said borough of Taylor, and that police power confers no authority or right to impose said fees, or any fees, upon said poles and wires.

Your petitioner avers that it is advised by counsel that this is a question involving the construction and application of the Constitution of the United States and the act of Congress of July 24, 1866, and therefore prays that an appeal may be allowed from the said judgment of the superior court, and that a certiorari be issued from this court, in accordance with law and the act of assembly in such case made and provided.

24 Annexed hereto is a copy of the opinion of the superior court affirming said judgment and filed herewith is a copy of the paper book of the appellant, the said appellee not presenting any paper book.

And it will ever pray, etc.

POSTAL TELEGRAPH CABLE COMPANY,
By WM. H. BAKER,
Vice President and General Manager.

STATE OF NEW YORK, } ss:
County of New York, }

William H. Baker being duly sworn according to law deposes and says that he is the vice president and general manager of The Postal Telegraph Cable Company, the defendant above named, and that the facts set forth in the foregoing petition, so far as stated upon his own knowledge, are true and so far as they are stated upon information derived from others, he verily believes them to be true.

WM. H. BAKER.

Sworn to and subscribed before me this 12th day of April, 1901.

THEODORE L. CUYLER, JR.,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

25 *Statement of Grounds for Appeal.*

Upon the argument in the superior court in this case, the power of the borough of Taylor to impose the license fees in question, was contested, upon the ground that they amounted to taxation upon interstate commerce, and the ordinance for this reason was void.

The case therefore, directly involves the construction or application of the Constitution of the United States and the post roads act of Congress of July 24, 1866, and the appellant therefore believes it has the right to appeal to this court. It is believed by counsel that this case presents the question which it is desired to have determined, in a concise form and favorable for the defendant. The poles and wires for which license fees were imposed were a part of its interstate telegraph system connecting with submarine cables from the United States to Europe and other foreign countries; no business whatever was transacted in the borough of Taylor; the defendant had no office there, and it was set forth positively by defendant that the borough of Taylor had not made any payments or disbursements for inspection or for regulating the line of the defendant, and that there was no inspection or regulation by the said borough, nor was there any cost or expense imposed upon it by the maintenance and existence of these poles and wires.

26 This court has undoubtedly in a number of cases involving the same point, decided the same adversely to the present contention of the defendant. This case is, however, of great importance, because of the large aggregate of charges of similar kind imposed by the cities and boroughs of this State; the record in this case showing that at the same rate, the total amount exacted from this defendant company, in the State of Pennsylvania, would be a sum exceeding $100,000 per annum.

This defendant company desires to have the question as to the right of the boroughs to impose such taxes under the guise of the exercise of their police powers, determined if possible by the Supreme Court of the United States. Because of the decisions already rendered by this court, the defendant would not again present this question for determination were it not for the fact of its desire to present the matter to the United States Supreme Court upon an appeal from this court, if its decision is against the contention of the defendant, and thus have the question finally determined and settled.

In presenting this matter it is proper to state that it is the belief of the defendant that the appeal is of right and not of grace, and

counsel desire to state that the endeavor will be made to make the burden of the disposition of the case, as light as possible.

FRANK R. SHATTUCK,
Att'y for Appellant.

27 Endorsement: 191 January term 1901. Borough of Taylor, appellee *v.* Postal Telegraph Cable Company appellant. Petition of Postal Telegraph Cable Co. for allowance of an appeal from the superior court of Penna. to the supreme court of Penna. May 1, 1901 appeal allowed. *Per curiam.* Filed April 22, 1901. In supreme court.

28 *Assignments of Error.*

In the Supreme Court of Pennsylvania, Eastern District, January Term, 1901.

BOROUGH OF TAYLOR
v.
POSTAL TELEGRAPH-CABLE COMPANY. } No. 191.

Assignments of error.

First. The learned superior court erred in affirming the judgment of the court of common pleas of Lackawanna county, of March term 1900, No. 447.

Second. The learned superior court erred in not reversing the judgment of the court of common pleas of Lackawanna county, of March term 1900, No. 447.

F. R. SHATTUCK,
Att'y for Postal Telegraph Cable-Co., App't.

Endorsement: In the supreme court of Pennsylvania, eastern district. January term 1901. No. 191. Borough of Taylor *v.* Postal Cable Co. Assignments of error. Filed Feb. 24, 1902. In supreme court.

29 Endorsement: 447 Mar. term 1900. C. P. Lackawanna Co. Borough of Taylor *v.* The Postal Telegraph Cable Co. appellant. Appeal bond. Filed June 16, 1900.

Opinion.

Supreme Court, Eastern District.

BOROUGH OF TAYLOR
v.
POSTAL TELEGRAPH CABLE CO., App't. } No. 191, January Term, 1901.

Appeal and certiorari from the judgment of the superior court of Pennsylvania, of January term, 1901, No. 24, affirming the judgment of the court of common pleas of Lackawanna county.

Filed May 19, 1902.

Per Curiam:

The judgment in this case is affirmed on the opinion of Judge Rice of the superior court.

30 *Docket Entries.*

No. 24, January Term, 1901.

In the Superior Court of Pennsylvania, in and for the Scranton District.

BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE CO., Appellant. } Appeal from the Court of Common Pleas for the County of Lackawanna by the Defendant. No. 447, May Term, 1900.

J. M. Harris, Esq., attorney for Borough of Taylor.
F. R. Shattuck, Esq., attorney for appellant.

June 9th præcipe filed.
Eo die certiorari filed.
Returnable 2nd Monday of January 1900.
Appellant's assignments of error filed December 13, 1900.
Submitted January 15th, 1901.
Now, February 14th 1901 at Williamsport judgment affirmed *per curiam.*
31 Remittitur and copy of opinion sent Prothonotary Copeland February 21st 1901.
Exit case.
April 22nd 1901 petition of Postal Telegraph Cable Company for an allowance of an appeal from the superior court to the supreme court filed on motion of Frank R. Shattuck, attorney for petitioner.
May 1st, 1901 appeal allowed. *Per curiam.*
True copy from record.

[SEAL.] In testimony whereof, I have hereunto set my hand and the seal of said court, at Scranton this fourth day of June 1902.

SAM. H. STEVENS,
Prothonotary.

Appeal and Affidavit.

In the Superior Court of Pennsylvania, at Scranton.

In the Common Pleas Court, County of Lackawanna.

BOROUGH OF TAYLOR, Plaintiff,
v.
THE POSTAL TELEGRAPH CABLE CO., Defendant. } No. 447, March Term, 1900.

32 And now the Postal Telegraph Cable Co. appeals from the judgment of the court of common pleas of the county of Lackawanna in the above entitled cause to the superior court of Pennsylvania.

PHILADELPHIA COUNTY, *ss:*

Chas. C. Adams, sup't being duly sworn according to law, doth depose and say that the above appeal is not intended for delay, but because the appellants firmly believe they have suffered injustice by the judgment from which they appeal.

CHAS. C. ADAMS,
Superintendent.

Sworn and subscribed before me this 7th day of May A. D. 1900.

EDWARD EVERITT,
Notary Public.

Enter the above appeal in the superior court.
To Sam. H. Stevens, Esq., prothonotary of superior court, Scranton district.

F. R. SHATTUCK,
Att'y for Appellant.

Endorsement: No. 24 January term 1901. Superior court of Pennsylvania, sitting at Scranton. Borough of Taylor *v.* The Postal Telegraph Cable Co., appellant, Appeal and affidavit. Filed June 9, 1900. F. R. Shattuck, attorney for appellant.

33 *Præcipe for Certiorari.*

In the Superior Court of Pennsylvania, Sitting at Scranton.

Borough of Taylor *v.* The Postal Telegraph Cable Company, Appellant.	Certiorari to the Court of Common Pleas of the County of Lackawanna, of March Term, 1900. No. 447.

Issue certiorari to the court of common pleas of the county of Lackawanna to bring up record and proceedings in a certain action in said court, No. 447 March term 1900 wherein Borough of Taylor is plaintiff and The Postal Telegraph Cable Company is defendant.

Returnable to next term, *sec. reg.*

To prothonotary, superior court, sitting at Scranton.

F. R. SHATTUCK,
Attorney for Appellant.

Endorsement: No. 24 January term 1901. Superior court of Pennsylvania. Sitting at Scranton. Borough of Taylor *v.* The Postal Telegraph Cable Co., appellant. Præcipe for certiorari. F. R. Shattuck, attorney for appellant.

34 *Assignments of Error.*

In the Superior Court of Pennsylvania.

Borough of Taylor
v.
Postal Telegraph Cable Company.

Assignments of error.

First. The learned court below erred in making the rule for judgment for want of a sufficient affidavit of defense absolute.

Second. The learned court below erred in not discharging the rule for judgment for want of a sufficient affidavit of defense.

F. R. SHATTUCK,
Attorney for Defendant.

Endorsement: # 24 January term, 1901. Borough of Taylor appellee *v.* The Postal Telegraph Cable Co., appellant. Assignments of error. Filed Dec. 13, 1900.

35 *Opinion of the Superior Court of Pennsylvania.*

In the Superior Court of Pennsylvania.

BOROUGH OF TAYLOR
v.
POSTAL TELEGRAPH CABLE CO. } No. 24, January Term, 1901. Appeal from Judgment of C. P. of Lackawanna County.

Per Curiam:

The defendant was incorporated under the laws of the State of New York and by its acceptance of the restrictions and obligations required by the act of Congress of July 24, 1866, 17 Stat. at L. 308, sec. 201, has acquired the powers and privileges conferred on that act. It has also paid to the Commonwealth of Pennsylvania all taxes imposed by her laws. It has no office in the borough of Taylor, and its poles erected within, and its wires running through the borough are used principally for the transmission of messages between the several States of the Union. No messages are received or sent in the borough, but it is not alleged that the wires are not used for the transmission of messages between different points within the Commonwealth. If such were the fact, we may safely assume that it would have been alleged in the affidavit of defense. Being engaged in intrastate as well as interstate business, and its poles and wires within the borough limits being used for both purposes, we think it clear, both upon reason and authority, that
36 it is subject to police regulation with respect to the same. It is equally well settled that the imposition of a reasonable annual license fee for each pole and mile of suspended wire erected within the limits of the borough is a legitimate exercise of the police power designated to cities and boroughs: Allentown *v.* W. U. Tel. Co., 148 Pa. 117; Phila. *v.* Am. Un. Tel. Co., 167 Pa. 406; North Braddock *v.* Central District & Printing Tel. Co., 11 Pa. Superior Ct. 24. It seems to us, therefore, that the only open question, if there be any, is as to the reasonableness of the fee.

Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge, are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. Hence an affidavit of defence which averred that the fee was "wholly disproportioned to the usual, ordinary or necessary expense of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality" was held to be insufficient to prevent judgment in an action for the fee. The supreme court said: "For the purposes of this case we must treat this averment as true as far as it
37 goes. The difficulty is it does not go far enough. It refers only to the usual, ordinary or necessary expenses of municipal officers, of issuing licenses and other expenses thereby

imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake therefore to measure the reasonableness of the charge by the amount actually expended by the city for a particular year to the particular purposes specified in the affidavit:" Chester *v.* W. U. Tel. Co. 154 Pa. 464. It is clear, further, that the reasonableness of the fee is not a question for the jury, otherwise we would have one jury deciding upon the proofs adduced in a particular case that the fee was reasonable and another jury deciding upon the pooofs adduced in another case, that the same fee in the same municipality was unreasonable. Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the court, and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly
38 exercise and the expense of the same. Such a decision becomes a precedent which is to be regarded in other cases similarly situated. Were it to be held otherwise, the law upon the subject would be in hopeless confusion and uncertainty. We make these remarks because we cannot escape the conclusion that some of the averments of the affidavit of defense are, in reality, but the opinion of the defendant, undoubtedly honestly entertained, as to these matters. They are not stronger than the averments in Philadelphia *v.* Am. Un. Tel. Co., 167 Pa. 406, and the other facts averred do not distinguish the case from others in which a similar fee in boroughs has been held to be not so obviously excessive as to warrant the courts in declaring the ordinance void.

The cases are collected in the opinion filed herewith in the case of New Hope *v.* W. U. Tel. Co.

Judgment affirmed.

Endorsement: 191 January term 1901. Borough of Taylor appellee *v.* Postal Telegraph Cable Company, appellant. Petition of Postal Telegraph Cable Co. for allowance of appeal from the superior court to the supreme court. May 1, 1901 Appeal allowed. Per Cur. Filed Apr. 22*1*, 1901 in supreme court.

39 (The opinion above referred to, New Hope *v.* W. U. Tel. Co is as follows:)

In the Superior Court of Pennsylvania.

BOROUGH OF NEW HOPE
v.
WESTERN UNION TELEGRAPH CO. } No. 101, Oct. Term, 1900. Appeal from Judgment of C. P. of Bucks County.

Per Curiam:

It has been decided first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone and electric light companies within city limits is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense
40 fifth, that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities: W. U. Tel. Co. *v.* Philadelphia, 22 W. N. C. 39; s. c. 11 Cent. Rep., 102; Allentown *v.* W. U. Tel. Co., 148 Pa. 117; Chester *v.* P. R. & P. Tel. Co., 148 Pa. 120; Chester *v.* W. U. Tel. Co., 154 Pa. 466; Philadelphia *v.* Am. Union Tel. Co., 167 Pa. 406; Ridley Park *v.* Citizens' Electric Light & Power Co., 9 Pa. Superior Ct. 615; Lansdowne *v.* Same, 9 Pa. Superior Ct. 620; North Braddock *v.* Central, etc. Tel. Co., 11 Pa. Superior Ct. 24; Kittanning Electric Light Co. *v.* Kittanning, 11 Pa. Superior Ct. 31. See also McKeesport *v.* McKeesport, etc. R'y Co., 2 Pa. Superior Ct. 242, North Braddock *v.* Second Ave. Tr. Co., 8 Pa. Superior Ct. 233, Lansdowne *v.* Delaware etc., Electric R'y Co., 9 Pa. Superior Ct. 621, and Taylor *v.* C. P. Tel. etc. Co., 8 Pa. Dist. Rep. 92.

In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and main-
41 tenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led by the conclusion that the court would not have been justified by the precedents in declaring the ordinance void. The facts being undisputed,

we take it that the question of the validity of the ordinance was for the court to decide. But, if on the undisputed facts, the court would not have been warranted in declaring the ordinance void, the submission of the question of the reasonableness of the fee to the jury was an error of which the defendant has no just cause to complain.

Judgment affirmed.

42 *Record of the Court of Common Pleas of Lackawanna County.*

Exemplification.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Lackawanna, in the Commonwealth of Pennsylvania, to No. 447 March term, 1900, is contained the following:

Copy of Continuance Docket Entry.

THE BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE COMPANY.

J. M. Harris
F. R. Shattuck

Summons in assumpsit exit, 10 Feb'y 1900 ret'ble to next term. Summoned

Feb'y 19, 1900.—Filed plaintiff's statement.

M'ch 19, 1900.—Filed affidavit of defence

Same day.—By paper filed, F. R. Shattuck directed his appearance entered for defendant.

April 18, 1900.—Rule for judgment for want of a sufficient affidavit of defence.

April 25, 1900.—Rule for judgment is made absolute. By the court (arg't list)

43 May 2, 1900.—On præcipe of plaintiff's att'y judgment is entered in favor of the plaintiff and against the defendant in the sum of $220.50

June 16, 1900.—Defendant appeals to superior court.

Same day.—Filed bond with Chas. C. Adams and Geo. G. Glenn as sureties in the sum of $500.00

Same day.—Bond approved. By the court.

June 16, 1900.—Filed certiorari from superior court returnable second Monday of Jan'y 1901.

May 21, 1901.—Filed certiorari from supreme court returnable forthwith.

LACKAWANNA COUNTY, *ss:*

In Common Pleas.

THE BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE CO. } No. 447, Mar. Term, 1900.

John Copeland, proth'y:

Issue summons in assumpsit in above case. Ret'ble *sec. leg.*

JOHN M. HARRIS,
Att'y for Pl'ff.
J. COPELAND,
Prothonotary.

Filed Feb'y 10, 1900. Att'y p'd $2.00

44 *Summons.*

LACKAWANNA COUNTY, *ss:*

The Commonwealth of Pennsylvania to the sheriff of the said county, Greeting:

We command you that you summon the Postal Telegraph Cable Company so that they be and appear before our court of common pleas, to be holden at Scranton, in and for said county, on the 3rd Monday of March next, there to answer the Borough of Taylor in the plea of assumpsit and have you then and there this writ:

Witness the Hon. R. W. Archbald, president judge of the said court, at Scranton, on the 10th day of Feb'y, A. D. 1900.

[SEAL.] J. COPELAND,
Prothonotary.

Served this writ Feb. 12, 1900 and summoned The Postal Telegraph Cable Company defendant by giving to R. J. Little, manager of said Postal Telegraph Cable Company, defendant, a true and attested copy of within writ and made known to him the contents thereof.

So answers

C. E. PRYOR, *Sheriff.*
J. D. FERBER, *Deputy.*

45 Endorsement: No. 447 Mc'h term 1900. The Borough of Taylor *v.* The Postal Telegraph Cable Company Summons Returnable to March term 1900. Manager R. J. Little Feb'y 12, 1900 Sheriff 1.86 J. M. Harris, attorney for plaintiff.

Plaintiff's Statement.

In Court of Common Pleas of Lackawanna County.

BOROUGH OF TAYLOR
v.
POSTAL TELEGRAPH CABLE COMPANY. } No. 447, March Term, 1900.

Plaintiff's statement.

The plaintiff claims of the defendant the sum of two hundred twenty and fifty-one hundr*ethd* ($220.50) be- the sum of license fees and charges due to the plaintiff by the defendant, according to the following statement and specification, including interest from January 31, 1898, of each year hereinafter stated.

The borough of Taylor was duly incorporated in November, 1893, under the borough act of 1851 (P. L. 320), and the supplement thereto. On the tenth day of January, 1894, the proper
46 authorities of the borough passed "a comprehensive ordinance regulating its municipal affairs in many particulars, some provisions of which being as follows:"

"TITLE XV.

"*Poles and Wires.*

"SECTION 1. The high constable shall inspect all poles used to carry wires erected upon the thoroughfares or public grounds of the borough by any person or corporation, and the high constable aided by the police under his charge shall see that the said poles and wires are kept in a safe and good condition; and if the high constable or the police shall find any defects in the condition of the said poles or wires, he or they shall report the same to the burgess forthwith.

"SECTION 2. The burgess on receiving notice of any defect in the condition of the electric wires or poles within the limits of the borough, shall notify the owner or manager of the corporation or persons owning the said wires or poles to repair the same immediately and put them in a safe and trustworthy condition, and if the said owner or manager of the corporation or persons owning the said wires or poles fail to do so with the dispatch which the case requires, the burgess shall instruct the high constable to remove
47 the danger, if any exists, by reason of any defective wires or poles, and the cost of such shall be defrayed by the person or corporation owning such poles or wires.

"SECTION 3. Every telephone, telegraph, electric and electric railway company erecting or maintaining poles or wires within the borough limits, shall pay an annual license fee of one dollar for each pole and two and one-half dollars for each mile of wire so erected or maintained; said license fee to be paid on or about the first Monday in April in each year."

The said defendant prior to and since the incorporation of the borough of Taylor has maintained and used poles and wires within the corporate limits of the said borough, and for the purpose of this suit has maintained and used poles and wires within the corporate limit of the said borough as follows, to wit:

Poles.

In the year beginning January 31, 1898, and ending January 31, 1899, 91 poles at $1 per year per pole	$91.
In the year beginning January 31, 1899, ending January 31, 1900, 91 poles at $1 per year per pole	91.
	$181.

48 *Wires.*

In the year beginning January 31, 1898, and ending January 31, 1899, 42,200 feet of wire at $2.50 per mile per year	$19.75
In the year beginning January 31, 1899, and ending January 31, 1900, 42,200 feet of wire at $2.50 per mile per year	19.75
Total for wire	$39.50
Total for poles and wires	$220.50

With interest upon the several amounts due for license fees, for poles and wires, as follows, to wit:

Interest upon the sum due for poles from January 31, 1898, to January 31, 1899	91.00
Interest upon the sum due for wires from January 31, 1898, to January 31, 1899	19.75

By reason whereof the said defendant, by force of said ordinance is indebted to the plaintiff in the said sum of two hundred twenty and fifty-one-hundredths dollars ($220.50), with interest as aforesaid, the payment of which has been demanded of the defendant by the plaintiff, and refused, wherefore said plaintiff brings this suit.

JOHN M. HARRIS,
Attorney for Plaintiff.

49 February 16, 1900.

Certified from the records this 26th day of February, A. D. 1902.

[SEAL.] J. COPELAND, *Proth.*

Endorsement: No. 447 March T. 1900. Borough of Taylor *v.* Postal Telegraph Cable Company. Plaintiff's statement. Copy. Filed Feb'y 26, 1902. John M. Harris, att'y.

Affidavit of Defense.

BOROUGH OF TAYLOR *v.* THE POSTAL TELEGRAPH CABLE COMPANY.	C. P. of Lackawanna Co., March Term, 1900. No. 447.

PHILADELPHIA COUNTY, *ss*:

Charles C. Adams, being duly sworn according to law, says that he is the superintendent of The Postal Telegraph Cable Company, the above-named defendant, and that the said company has a full, just and true defense to the whole of the plaintiff's claim of the following nature:

Deponent is advised and therefore alleges that the statement of claim filed in the above case is defective and insufficient in law, and that it is not such a statement as requires it to file an affidavit of defense. Reserving, therefore, the right to take advantage at any time hereafter of the manifest insufficiencies in the said statement of claim, deponent further avers:

That the Postal Telegraph Cable Company, the above defendant, is a corporation duly organized and existing under the laws of the State of New York, and has paid to the Commonwealth of Pennsylvania all taxes charged by legislative enactment upon the value of its poles and wires erected and maintained in the said borough of Taylor and elsewhere in the State of Pennsylvania, the same being included in and represented by its capital stock and upon the gross receipts derived from the use of all of the said poles and wires; and further, that it has accepted the act of Congress approved July 24, 1866, and the amendments and supplements thereto, and that the poles and wires in question were constructed and have been at all times and are now operated thereunder and are principally employed and operated in the transmission of messages between the different States, and are therefore instruments of commerce among the several States; and for these reasons, the ordinance referred to in the plaintiff's statement is illegal and void.

That the said poles and wires were constructed and have been at all times and are now used for the transmission of telegraphic messages of the United States Government and the various departments thereof, at prices fixed from time to time by the Postmaster General of the United States, in accordance with the terms of the said act of Congress, approved July 24, 1866, and that the highways upon which said poles and wires are constructed and operated are post roads and post routes within the meaning of the said act of Congress, approved July 24, 1866, and the amendments and supplements thereto, and the acts of Congress defining post roads and post routes.

That the said poles and wires and telegraph lines are part of the inter-state telegraph system of the defendant, running into and through nearly every State of the United States, and connecting

with submarine cables from the United States to Europe and other foreign countries, and that messages transmitted over such telegraph lines maintained by the said poles and wires, in the said borough of Taylor, are in part, telegraphic messages between different States of the United States and between the United States and foreign countries, and said messages are one species of interstate and international commerce.

That the defendant never has and does not now maintain any office whatsoever in the said Borough of Taylor, plaintiff
52 herein, and defendant's said telegraph line, consisting of said poles and wires, merely runs through said borough of Taylor, and no telegraphic business of any kind whatsoever is done or transacted by said defendant in said borough of Taylor, except the maintenance of the said telegraph line and the transmission of telegraphic messages over the same.

That the said ordinance of the said borough of Taylor, mentioned in the plaintiff's statement, imposes a tax upon interstate business and is illegal and void as an unlawful interference with commerce among the several States and with foreign nations, and as depriving the defendant of its property without due process of law and as denying the defendant the equal protection of the laws and as a tax levied on a franchise granted by the United States of America and upon one of the instrumentalities employed by the Government thereof in the carrying on of the said Government.

Deponent further avers that the said Borough of Taylor neither on the tenth day of January, 1894, nor at any other time, had any right, power or authority vested in it to pass or enact an ordinance of the character and description referred to in the plaintiff's statement, and impose a license tax upon the defendant company, and that the said ordinance having been passed by the said plaintiff without authority of law, is therefore inoperative and void.
53 That the said ordinance of the plaintiff imposing a license fee upon the defendant of $1. for each pole and $2.50 for each mile of wire within said borough, is unreasonable, unjust and excessive, and is illegal and void in this, to wit, that the said ordinance is designed and intended to provide revenue by taxation for the general expenses of the said borough; that no other object than this exists, or has at any time existed, for such regulations as are imposed by the terms thereof; that the said borough is under no expense whatever of issuing the license required by the said ordinance, and has not been at any time before, during or after the period mentioned in the plaintiff's statement for which it makes its charge, under any expenses of any kind or nature whatsoever in inspecting and regulating the said poles and wires.

That the license fees imposed by the said ordinance are not based upon the cost and expense of said borough for inspection, supervision and regulation of defendant's lines and business, but said fees are imposed notwithstanding they are more than twenty times the amount that might have been or could possibly be incident to such inspection, supervision and regulation, together with all reasonable

measures and precautions that might have been or possibly could be required to be taken by the said borough for the safety of
54 its citizens and the public, or which might have be-n or possibly could be incurred as expenses for the most careful, thorough and efficient inspection and supervision that might have been made of the said poles and wires, and notwithstanding, as above set forth, the fact that the said plaintiff has not and does not maintain any inspection, supervision or care whatsoever over said poles and wires of the said defendant company, and has not incurred any expense whatever on account thereof. That the said plaintiff is not and was not during said period mentioned in the statement of claim filed in this case, under any additional or incidental liability of any kind or nature whatsoever in looking after the safety of such poles and wires and the maintenance thereof, and is not or was not under any additional or incidental liability for any injuries to persons or property which might have arisen or did arise during said period or could possibly arise by reason of the erection of the said poles and the stringing of the said wires within the limits of the said borough; that the said charges were made without any kind or character of expense or liability having been incurred by the said borough of Taylor. Under all of the circumstances above set forth, the assessing of such license tax or charge against defendant company is and was for the sole purpose of raising and producing revenue to said borough, wherefore said ordinance is illegal and void.

55 That the said borough is a sparcely populated district and the land therein of small value, and most of the land along the highway on which said telegragh line is constructed is not adapted for building purposes nor commercial use and said highway is little travelled. That said borough is a coal mining community and the buildings therein consist for the most part of coal miners' cabins or houses of one or two stories, and the business buildings are scattered and consist mostly of small shops or stores.

That the rental value of the land used by the defendant in the maintenance of its poles and wires in the said borough of Taylor is worth not exceeding 25 cents per annum for the ground occupied by each pole; that the said poles and wires thereon are located on the side of the highway at a point between the roadway and what is or could be used as a sidewalk, and said poles do not interfere in the slightest degree or to any extent with the use of the said highway for all highway purposes, nor with the use of the said sidewalk for all the usual purposes of a sidewalk and does not interfere in any way with any kind of traffic and said poles and wires have not, do not and cannot interfere in any way with the operation of men or apparatus in extinguishing fires; and the same is not an old decayed and worn out line, but, on the contrary, is compara-
56 tively new and sound, and there is no danger of accident from the decay or breaking down of the said poles and wires.

That the said license fees imposed by the said ordinance are not disproportionate to the value of the property upon which defendant's lines are located, nor to the obstruction to the highways caused

by said lines, nor to the interference with travel or business caused by the said lines within said borough; but, on the contrary, amount to twenty times as much as could be imposed under any power existing in said borough to make charges for such purposes, if such power existed, which defendant denies.

That the amount of said license fee is arbitrarily fixed by the Borough of Taylor without reference to any expense, inconvenience or detriment to said borough, either incurred or possible to be incurred, on account of the maintenance of the defendant's lines. That the amount of the said license fees, imposed upon the defendant by said ordinance, to wit, the sum of $110.25, largely exceeds the entire cost to the defendant itself of maintaining said line, including all repairs, reconstruction, cost of labor and materials and travelling expenses of employees and all expenses incurred by the defendant for a careful and efficient inspection and maintenance thereof.

That the said license fee imposed by the Borough of Taylor on this defendant, amounts to about $1.22 per pole per year,
57 which is in such amount in excess of the expenses of inspecting and supervising the said poles and wires and issuing a license and of indemnity against liability of any kind against said Borough of Taylor by reason of the injuries or otherwise. That the purpose of the said license tax or charge against defendant, as above set forth, is for the sole purpose of raising and producing revenue for said borough, and the amount thereof is manifestly unfair, unjust, excessive and unreasonable, and the same is void; and the said license tax, to recover which this suit is brought, is an attempt to tax the property of the defendant situated in said borough, and inasmuch as said defendant, as above set forth, has paid all of its corporation taxes in the State of Pennsylvania, its property in said borough is not subject to direct taxation, and for this reason also the said ordinance is illegal and void.

That the license fee imposed by said ordinance upon this defendant is prohibitive in that it exacts a charge so excessive as to destroy the defendant's business, the character, quality and management of the same being such that it is conducted upon the best, safest, most careful and most prudent principles.

That is the same license fees were exacted in all of the boroughs and municipalities covered by this defendant's telegraphic system in the State of Pennsylvania, the total amount would be a sum exceeding one hundred thousand dollars per annum.

58 That the said license fee is in the nature of a tax, and not of a license for reimbursement of expenses and other liabilities of the said borough in connection with said poles and wires, and the said ordinance is illegal and void, on account of the following facts to wit:

That the only large telegraph systems in the United States are those of the defendant and of the Western Union Telegraph Company, and that the said system of the Western Union Telegraph Company is constructed almost entirely upon the rights of way of the railroads throughout the United States, and said ordinance is

not applicable to the poles and wires of the said Western Union Telegraph Company, on railroads passing through said borough, but on the contrary, said ordinance applies only to poles and wires upon the thoroughfares or public grounds of the borough; the result being that the poles and wires of the said Western Union Telegraph Company are not affected by the said ordinance, while the poles and wires of the defendant, are affected by said ordinance and this condition of affairs applies not only to said borough, but to all the boroughs throughout the State of Pennsylvania, and in every State, with the result that if similar ordinances should be passed by all of the boroughs in said State of Pennsylvania and by municipalities in other States, it would be impossible for the defendant to continue to maintain and operate its line in competition with said Western
59 Union Telegraph Company, but, on the contrary, it would become insolvent by reason of the fact that the expenses and operation, including the said license fees, would be far in excess of the receipts of the defendant; the fact being that the defendant is obliged, in nearly every State of the Union, to construct its lines upon the highways, inasmuch as the said railroads are unwilling and refuse to allow the defendant to construct its telegraph lines on the said railroad right of way.

That the defendant's poles and wires were lawfully erected on said highways in said borough of Taylor, originally, in the year 1886 and long before the incorporation of the said Borough of Taylor, and said borough has no legal authority to require the defendant to obtain from it a license to maintain the same.

Deponent therefore avers that the said defendant company is in no way or manner liable to the said Borough of Taylor, and the sum of $220.50 is improperly charged; and that neither said amount, nor any other sum, is due by said defendant to it the said plaintiff.

CHARLES C. ADAMS.

Sworn and subscribed to before me this 17th day of March, 1900.

[SEAL.] EDWARD EVERITT,
Notary Public.

60 Endorsement: 447 Mar. T. 1900. Borough of Taylor *v.* The Postal Telegraph Cable Co. Affidavit of defense Filed Mar. 19, 1900.

Appearance for Defendant.

BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE COMPANY.
} C. P., Lackawanna Co., March Term, 1900. No. 447.

Enter my appearance for the defendant in above case.

F. R. SHATTUCK,
Att'y for Def't.

To proth'y.
March 17, 1900.

Endorsement: 447 Mar. T. 1900. C. P. Lackawanna county. Borough of Taylor *v.* The Postal Telegraph Cable Co. Appearance for def't. Filed M'ch 19, 1900. Shattuck.

61 In the Court of Common Pleas of Lackawanna County.

THE BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE CO. } No. 447, Mar. T., 1900.

To prothonotary:

Enter judgment in above stated case as per rule for judgment made absolute for want of a sufficient affidavit of defence for the sum of two hundred twenty and $\frac{59}{100}$ dollars and costs.

JOHN M. HARRIS,
Att'y for Pl'ff.

Endorsement: No. 447 M'ch 1900 The Borough of Taylor *v.* Postal Telegraph Cable Co. Filed May 2, 1900.

Common Pleas of Lackawanna County.

THE BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE COMPANY. } No. 447, March Term, 1900.

62 The plaintiff above-named excepts to the sufficiency of the affidavit of defense filed in the above case, as follows, to wit:

1st. The affidavit does not state any sufficient defense to the plaintiff's cause of action.

2nd. The above case comes up between the same parties and in the same court as the cases appearing at numbers 119 May term, 1895, and 639 January term, 1899, and entitled "The Borough of Taylor *v.* The Postal Telegraph Cable Company."

3rd. The parties are identical, the material facts are substantially the same, the principles of law involved are identical, the cause of action is the same, involving the same questions of fact and law.

4th. The exact points raised in this case have been passed upon in the cases just mentioned, and also in the case of The Borough of Taylor against The Central Pennsylvania Telephone and Supply Company, in common pleas of Lackawanna county, No. 680 January term, 1895, the case having been heard before Judge McPherson specially presiding under the provisions of the act of 1874, without a jury. After a careful consideration of the questions of law and fact raised in this case, he directed judgment to be entered in favor of the plaintiff. In his opinion he refers to the opinions of

63 Judge Albright and Archbald as having passed upon and decided the exact points raised by the defendant in the case of The Borough of Taylor *v.* The Central Pennsylvania Telephone and Supply Company just cited.

5th. The affidavit of defense filed in the case at bar bring the third case to come before this court, and the three cases being between the same parties, involving the same points of law, and based upon the same cause of action, raises the same questions of fact, brings before this court no point either of law or fact, that has not been judicially passed upon by this court in a careful, regular, deliberate and just manner, and the matters and things involved in the said case were prosecuted to final judgment by this court, and have become in all respects *res judicata.*

It would appear that the defendants in this case, in view of the facts just stated above, and in view of the further fact that when the case has come for final judgment in the appellant courts the defendant has invariably paid the amount of the judgment and thus avoided a decision by the superior court of Pennsylvania, making further litigation in this manner unwarranted and impossible. We would respectfully submit therefore that the cases are not defendant in good faith, and respectfully submit that a rule for judgment for want of a sufficient affidavit of defense ought to be granted.

JOHN M. HARRIS,
Attorney for Plaintiff.

64 Endorsement: Common pleas of Lack'a Co. No. 447 March term, 1900. The Borough of Taylor *v.* The Postal Telegraph Cable Co. Now March — 1900, upon filing the within petition and upon motion of John M. Harris, attorney for plaintiff, rule is granted upon the defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defense. Returnable to next argument court. Filed April 18, 1900.

Appeal Bond.

BOROUGH OF TAYLOR *v.* THE POSTAL TELEGRAPH CABLE Co., Appellant. } C. P. of Lackawanna Co., March Term, 1900. No. 447.

The Postal Telegraph Cable Co. appellant having appealed from the judgment of the court of common pleas of the county of Lackawanna entered May 2, 1900 to the superior court, comes into court with Charles C. Adams and Geo. G. Glenn, its sureties and they acknowledge themselves bound and indebted to the Commonwealth of Pennsylvania, for the use of Borough of Taylor in the
65 sum of five hundred dollars to be levied of their property, real and personal, to be paid said obligee its certain attorneys or assigns.

Upon this condition, that if the said appellant shall prosecute the appeal with effect and abide the order or decree of the appellate court, and pay all costs and damages awarded by the appellant court, or legally chargeable against said appellant, and pay all damages for injuries suffered by appellees from the time of the

decree entered and all mesne profits accruing after judgment, then the above obligation to be void, or else to remain in full force and virtue.

POSTAL TELEGRAPH CABLE CO.,
By C. C. ADAMS, *Superintendent.*
(Stamp.) CHARLES C. ADAMS.
GEO. G. GLENN.

Sealed and delivered, the ninth day of June, A. D. 1900.
In presence of
EDWARD EVERITT.

June 16, 1900.—Bond approved
J. COPELAND, *Proth'y.*

66 *Writ of Certiorari.*

In the Superior Court of Pennsylvania.

THE SUPERIOR COURT OF PENNSYLVANIA, *Sitting at Scranton,* } *ss:*

The Commonwealth of Pennsylvania to the judges of the common pleas court for the county of Lackawanna, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of The Postal Telegraph Cable Co. from our decision in the case of Borough of Taylor *v.* The Postal Telegraph Cable Co. No. 447 M'ch term 1900, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the judges of our superior court of Pennsylvania, at a superior court to be holden at Scranton the second Monday of January next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that
67 which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, doctor of laws,
[SEAL.] president judge of our said superior court at Scranton the 9th day of June, in year of our Lord one thousand nine hundred.

SAM. H. STEVENS,
Prothonotary.

Endorsement: No. 24 January term 1901. Superior court. Certiorari to the com. pleas court county of Lackawanna. Returnable the second Monday of January, 1901. Rule on the appellee, to appear and plead on the return-day of the writ. Filed June 16, 1900. Pd. 3.00 Shattuck, att'y.

Writ of Certiorari.

In the Supreme Court of Pennsylvania.

EASTERN DISTRICT OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Lackawanna, Greeting:

68 We being willing for certain causes, to be certified of the matter of the appeal of Postal Telegraph Cable Company, from the judgment of the superior court No. 24, January term 1901 in affirming the judgment of the court of com-
[SEAL.] mon pleas of the county of Lackawanna No. 447 March term 1900 wherein Borough of Taylor was plaintiff and the said appellant was defendant, before you, or some of you depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, forthwith, so full and entire as in our court before you they remain, you certify and send together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable J. Brewster McCollum, chief justice of our said supreme court at Philadelphia, the twentieth day of May in the year of our Lord one thousand nine hundred and one.

CHAS. S. GREENE,
Prothonotary.

69 To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

H. M. EDWARDS, *P. J.*

Endorsement: In C. P. Lackawanna No. 447 March term 1900. In superior court No. 24 January term 1901. No. 191 January term 1901 supreme court. Borough of Taylor *v.* Postal Telegraph Cable Company, appellant. Certiorari to the court of common pleas for the county of Lackawanna. Returnable forthwith. Rule on the appellee, to appear and plead on the return-day of the writ. *In re* petition for an allowance of an appeal from the superior court. May 1, 1901 Appeal allowed, *per curiam.* In testimony whereof witness my hand and official seal this 20th day of May, A. D. 1901. Chas. S. Greene, prothonotary. (Seal) Filed Feb. 24, 1902. In supreme court. Filed May 21, 1901. 3.00 due. Frank R. Shattuck.

70 UNITED STATES OF AMERICA, } ss:
State of Pennsylvania, }

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record pages 1 to 69 inclusive is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending wherein The Postal Telegraph Cable Company was appellant, and The Borough of Taylor was appellee.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district at Philadelphia, the 9th day of July, 1902, and in the one hundred and twenty sixth year of the Independence of the United States.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern District.

71 I, J. Brewster McCollum chief justice of the supreme court of Pennsylvania, do hereby certify, that Charles S. Greene was, at the time of signing the annexed attestation, and now is, prothonotary of the said supreme court of Pennsylvania, in and for the eastern district, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this ninth day of July one thousand nine hundred and two.

J. BREWSTER McCOLLUM.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, in and for the eastern district, do certify, that the Honorable J. Brewster McCollum by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, chief justice of the supreme court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania, in and for the eastern district, at Philadelphia, this ninth day of July one thousand nine hundred and two.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE.

72 In the Supreme Court of the United States of America.

BOROUGH OF TAYLOR
against
POSTAL TELEGRAPH-CABLE COMPANY, Appellant. } No. —, —— Term.

Assignments of Error.

1. The learned court erred in affirming the judgment of the superior court of Pennsylvania.

2. The learned court erred in not reversing the judgment of the superior court of Pennsylvania.

FRANK R. SHATTUCK,
Attorney for Defendant.

June 25, 1902.

[Endorsed:] No. — —— term. In the supreme court of the United States of America. Borough of Taylor against Postal Telegraph-Cable Company, appellant. Frank R. Shattuck, att'y for appellant.

Endorsed on cover: File No. 18,615. Pennsylvania supreme court. Term No. 93. The Postal Telegraph-Cable Company, plaintiff in error, *vs.* The Borough of Taylor. Filed July 22d, 1902.